IBRAHIM AWANG MAT

v.

IBRAHIM DOLLAH

HIGH COURT MALAYA, KOTA BHARU
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 46 OF 1982]
27 NOVEMBER 1985

CIVIL PROCEDURE: *Land Settlement Ordinance 1955 (Kelantan) - Sections 8(1), 10(1), 16(1) - Should an aggrieved party file fresh suit or appeal.*

The plaintiff sought declaration that the deceased's estate possessed superior title and was entitled to the 21/84 undivided share of the land that was known and identified as Lot 3147 in the Mukim of Cherang Ruku, District of Pasir Puteh, Kelantan. He also asked for a declaratory order that the possessory title to the lot granted to the defendant on 27 July 1977 by the hearing officer in RPT PP 73/76 was *ultra vires* the Kelantan Land Settlement Ordinance 1955, that the possessory title granted to the defendant be set aside and that the lot be confirmed in the name of the estate of the deceased and for an order that the defendant register the said transfer failing which the Senior Assistant Registrar, High Court, Kota Bharu be empowered to do so. The dispute between the parties arose as to whether the undivided half share of the said property which belonged to the deceased had been sold to the defendant as was claimed by him or mortgaged to the defendant as was claimed by the plaintiff.

Held:

[1] The declaratory order sought would not be issued as the defendant's version that he actually bought the lot from the deceased and had been in occupation since was more credible. The Court was satisfied the defendant had been in possession continuously, from the date of the transaction and not merely after the land scheme appeal.

[2] The second prayer held no water as the hearing officer had from the facts adduced at the hearing quite rightly found that the defendant was in possession and gave him possessory title as provided for under the Ordinance. Having acted under s. 8(1) of the Ordinance he was not acting *ultra vires* the Constitution and if it was the plaintiff's intention to set aside that order on the same facts as pleaded in the inquiry and appeal, he should have taken steps to appeal to the High Court under s. 16(1) of the Ordinance. The second and third prayer would be dismissed with costs. In any event even if an appeal had been filed there was no evidence to show that the decision was incorrect.

[3] Where an aggrieved party who is a person entitled to be registered as proprietor files a suit claiming superior title, he can, as in this case, file an action under s. 10 of the Ordinance but as on the facts it is clear that the lot had in fact been sold to the defendant.

[Plaintiff's claim dismissed with costs.]

Cases referred to:
Wok v. Fatimah [1964] 30 MLJ 35
Fatimah v. Wok [1964] 30 MLJ 318
Deraman bin Din & Ors. v. Ibrahim bin Mamat [1975]1 MLJ 142

Deraman & Ors. v. Mek Yam [1977] 1 MLJ 52
Som binti Daud & Ors. v. Nik Mustaffa bin Nik Idris & Ors. [1978] 1 MLJ 13
Mek binti Idris v. Nor bin Awang [1978] 2 MLJ 257

Legislation referred to:
Evidence Act 1950, ss. 120, 122
Land Settlement Ordinance 1955 (Kelantan), ss. 8(1), 10, (1), 16, (1)

For the plaintiff - Mahmood Adam; M/s. Mahmood Adam, Wan Ismail & Co.
For the defendant - Che Man bin Che Mud; M/s. Che Man & Partners

JUDGMENT

Abdul Malek J:

The plaintiff, in his capacity as the administrator of the estate of his mother Mihah Bt. Salleh ("the deceased"), is seeking a declaration that the deceased's estate possesses superior title and is entitled to the 21/84 undivided share ("the lot") of land known and identified as Lot 1347 in the Mumim of Cherang Ruku, District of Pasir Puteh, Kelantan.

Further, he is also asking for a declaratory order that the possessory title to the lot granted to the defendant on 27 July 1977 by the hearing officer in RPT PP 73/76 is *ultra vires* the Kelantan Land Settlement Ordinance 1955 ("the Ordinance"), that the possessory title granted to the defendant on 27 July 1977 be set aside, that the lot be confirmed in the name of the estate of the deceased and for an order that the defendant register the said transfer failing which the Senior Assistant Registrar, High Court, Kota Bharu shall be empowered to do so. He also prayed for costs and further or other relief.

From the evidence adduced by the plaintiff (PW1), the Court was told that he was one of the seven children of the deceased who died in 1951 when PW1 was in Standard Two. The land in question had been given to the deceased and her sister Mariam by their father Salleh Dotang in equal undivided shares and PW1 said he and his eldest brother Ismail had been in occupation since their mother's death. The quit rents were paid by them and their aunt.

He added that the defendant was the son-in-law of their aunt Mariam, and the defendant at the land scheme inquiry on 27 July 1977 had stated that he had bought the half share of the deceased's share and was accordingly given possessory title of that portion. The appeal by PW1 was heard on 19 January 1981 and that same decision was confirmed by the district officer. PW1 maintained that the lot was not sold to the defendant but mortgaged. He had no personal knowledge on this but was told, as he said in his cross examination, by his father and, as he said in reexamination, by his aunt. He only knew of the alleged purchase when the land scheme officers went to view the land before the inquiry. He admitted that the defendant had planted tobacco on the lot but the coconut trees were already there before that. He also stated that the defendant built the house on the lot only after the land scheme appeal.

PW1's eldest brother Ismail (PW2) corroborated PW1 on the fact that his maternal grandfather had left the deceased and her sister a half share each in a four acre plot. He said he knew of this in 1949 when his father told him. At that time he was 18. He stayed with his mother on this half share. His father had built a wooden house on it in 1948 and he built a house next to it in 1950. He added that at that time the coconut trees were already there and that the half share was demarcated by a row of trees.

PW2 further told the Court that the defendant was married to his cousin Zawiyah, who passed away in 1957, and later to Limah bte Daud (PW3) who he later divorced after nine months of marriage. He also maintained that the defendant did not occupy the lot until after the land scheme inquiry.

Under cross-examination, he agreed that his mother died not on this lot but in Tanah China Puteh, which was four lots away, where she had lived for 15 years prior to her death. Then later he stated his mother died on this lot and not on Tanah China Puteh and clarified that earlier he could not think properly as he had just recovered from illness. He also said the land was divided by three jembal trees planted by the deceased, his aunt and the defendant respectively.

The next witness (PW3) was the ex-wife of the defendant who stated that defendant had told her that the land was mortgaged by the deceased to the defendant for RM200. In view of the defence Counsel's objections as regards its admissibility and after hearing arguments from both sides, I ruled that she was not permitted to disclose the communication made by the defendant in view of the second limb (the emphasis is mine) of s. 122 of the Evidence Act 1950 which reads:

> Communications during marrige
> 122. No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; **nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents**, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other,

although under s. 120 of that Act, the husband or wife of any party to a suit shall be competent witnesses. Her evidence on this matter was therefore disregarded.

Another of the plaintiff's aunts (PW4) gave evidence that the deceased had borrowed RM200 from her to transfer her (the deceased's) land to her children and had wanted the money to correct the wrong positions on the land in view of a boundary dispute. The money was later repaid.

The defendant told the Court that he had bought the lot from the deceased about a year before her death when his wife was pregnant with their first child who is now 30 and married with seven children. At that time the deceased stayed in Tanah China Puteh. The defendant said he went into possession and three baru trees were planted by him, the deceased and his mother-in-law's husband, to demarcate the boundary. The defendant said he built a house and planted coconut and banana trees.

The purchase price was RM600 made up of RM200 paid to the deceased direct, RM200 for the repayment of the deceased's loan from PW4 and RM200 set off for sundry items the deceased took from him. Under cross-examination he said the land was not transferred as there was no title deed. He had asked the deceased to transfer the land several times. DW2 told the Court that when she went to massage the deceased, who was staying in Tanah China Puteh, and was curious to know why she stayed on someone else's land, the deceased had told her that she had sold her own land to the defendant.

The facts in essence were similar to those presented at the land scheme inquiry and at the subsequent appeal. It is therefore pertinent at this stage to refer to the law on this point.

In *Wok v. Fatimah* [1964] 30 MLJ 35 the plaintiff brought an action for superior title under s. 10 of the Ordinance after possessory title had been given to the defendant by the inquiry officer which was confirmed at the subsequent appeals both before the district officer and High Court. It was held that the defendant's preliminary plea of *res judicata* in the High Court failed under these circumstances. In the subsequent appeal, the Federal Court in *Fatimah v. Wok* [1964] 30 MLJ 318 held that the land officer has to make a finding of fact as to who was in possession of the land but under s. 10 of the same Ordinance the Judge has to go into the question of legal title. In that case, the facts presented had been the same at all levels.

In *Deraman bin Din & Ors. v. Ibrahim bin Mamat* [1975] 1 MLJ 142 it was decided that under the Ordinance, the function of the district officer is not only to decide who is in possession but also who is entitled to possession. As he had made a valid order, the plaintiffs were precluded from bringing their action under s. 10 of the Ordinance. It was also held that s. 10 only allows the Court to hear the party or parties if they were not before the land inquiry before. When it went on appeal vide *Deraman & Ors. v. Mek Yam* [1977] 1 MLJ 52 the Federal Court ruled, with a two to one majority, that a person aggrieved by a district officer's decision at an inquiry should file an appeal under s. 16 and not an action under s. 10 as the action was not to establish a superior title but to challenge the correctness of the district officer's decision. In any case the plaintiffs had not taken out letters of administration for their father's estate and therefore had no capacity to sue.

In *Som binti Daud & Ors. v. Nik Mustaffa bin Nik Idris & Ors*. [1978] 1 MLJ 13 absolute title had been given to the appellants but on appeal, the district officer gave possessory title to both the appellants and respondents. The High Court dismissed the appeal and the Federal Court held that since the appeallants were claiming superior title, they could bring an action under s. 10 of the Ordinance.

In *Mek binti Idris v. Nor bin Awang* [1978] 2 MLJ 257 the hearing officer had given absolute title to the plaintiff as original owner but on the defendant's contention on appeal that he had bought the said land from the plaintiff's father and that he had been in occupation, the defendant was given possessory title. The plaintiff did not appeal under s. 16 but brought an action under s. 10 claiming that the district officer had acted *ultra vires* the Ordinance. It was held that if a person aggrieved by the decision of the district officer was desirous of setting it aside on the same arguments pleaded before the latter then he had to do so by way of an appeal under s. 16 of the Ordinance as the claim was not the assertion of a superior title by the plaintiff but to set aside the order of the district officer for being *ultra vires* the Ordinance.

In this case, the plaintiff's first prayer seeks a declaratory order that the deceased's estate possesses superior title to the lot. To my mind, this hinged on a question of fact as to whether the defendant had in fact bought the lot from the deceased. Having seen and heard both parties, I believe the defendant's version that he had actually bought the lot from the deceased in 1951 for RM600 and had been in occupation since. This amount was made up of a RM200 set off for sundry items taken from him, a RM200 outright payment and a RM200 payment for the loan the deceased took from PW4.

The plaintiff contends that the defendant got the lot on a RM200 mortgage the deceased took on it. He has no direct knowledge on the matter as he was only in Standard Two at that time and relied on what his father (who had since died) and his aunt (who was

not called) had told him. In this trial he maintained that the defendant came onto the land only after the land scheme appeal which is obviously an afterthought considering the fact that in his evidence at the inquiry he had stated that the defendant had been in occupation since the mortgage. The fact of possession by the defendant had also been pleaded by him in para. 3 of his statement of claim. The planting of one of the boundary trees by the defendant was also confirmed by PW2. As such, I was satisfied that the defendant had been in possession all along from the transaction and not only after the land scheme appeal.

An important point to note is that both parties actually agree that there was in fact a transaction between the deceased and the defendant as regards the lot except that the kind of transaction was disputed. The plaintiff contends it was a security for a loan. Now if this was so, why did the plaintiff not take any steps to redeem it until the land scheme inquiry some 26 years later? There is no evidence of the plaintiff or any other member of his family offering to pay back to RM200 mortgage to the defendant. We also have evidence that the deceased after the transaction did not stay on the lot although PW2 did make an attempt to change his evidence on this point. On a balance of probabilities, I found as a fact that the defendant had indeed bought the lot from the deceased for RM600 in 1951 and was of the opinion that the plaintiff's first prayer in the circumstances should be dismissed with costs as he had not been able to establish superior title in view of the fact that he could not prove that there was no sale at all by the deceased to the defendant or that there had only been a mortgage transaction between them.

As regards his second prayer that the possessory title to the lot granted to the defendant on 27 July 1977 by the hearing officer was *ultra vires* the Ordinance and that it should be set aside and confirmed in the name of the estate of the deceased, I held that this did not hold water as from the facts adduced at the inquiry, the hearing officer quite rightly found that the defendant was in possession and he gave him possessory title as provided for under the Ordinance. Having acted under s. 8(1) of the Ordinance, he was not therefore acting *ultra vires* the Ordinance and if it was the plantiff's intention to set aside that order on the same facts as pleaded in the inquiry and appeal, he should have taken steps to appeal, against the decision of the officer hearing the appeal, to the High Court under s. 16(1) of the Ordinance. In the result, I found that his prayer was misconceived and also dismissed it together with the third prayer (for the defendant to register a transfer of the lot to the plaintiff failing which the Senior Assistant Registrar in Kota Bharu is empowered to do so) with costs.

In the cases referred to, much has been said as to whether as aggrieved party should file an appeal under s. 16(1) of the Ordinance or file a fresh suit under s. 10(1) of that Ordinance. In a well reasoned judgment, Zahir J in *Mek binti Idris v. Nor bin Awang* [1978] 2 MLJ 257 had stated his interpretation of the relevant sections of the Ordinance and I fully agree with him. Where an aggrieved party who is a person entitled to be registered as proprietor files a suit claiming superior title, he can, as in this case, file an action under s. 10 of the Ordinance but as I have stated earlier, on the facts I had found that the lot had in fact been sold to the defendant. As regards his claim that the district officer had acted *ultra vires* the Ordinance, I found that this was a proper case for appeal under s. 16(1) of the Ordinance as the prayer necessitated the setting aside of a previous order by the district officer based on the same facts. However apart from it being wrongly

brought, I also held that in the circumstances, even if it was correctly brought by way of appeal, there was no evidence to show that the hearing officer had acted wrongly or beyond the scope of the Ordinance and I was of the view that his decision on those facts was correct.

Accordingly I dismissed the plaintiff's claim with costs.

Also found at [1988] 2 CLJ 188